Office-Supreme Court, U.S.
FILED
FEB 1 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 675

October Term, 1962

PAUL E. RHODES,

Petitioner,

vs.

NORVAL HOUSTON, et al.,

Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PAUL E. RHODES, *pro se*,
Howe, Nebraska.

GANT PUBLISHING CO., Lincoln, Nebraska

INDEX

Subject Index

	Page
Argument	1
Conclusion	11

Cases Cited

Baird v. Sexton, 277 F. 2d 418	9
Cawley v. Warren, 216 F. 2d 74	7
Ex Parte Virginia, 100 U. S. 346, 25 L. Ed. 676	8
Francis v. Kraft, 203 F. 2d 809	7
Home Tel. Co. v. City of Los Angeles, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510	8
In Re Oliver, 333 U. S. 257, 68 S. Ct. 499	9
Kenney v. Fox, 232 F. 2d 288	7
Love v. State, 71 Tex. Crim. 259, 158 S. W. 532	10
Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081	1
Monroe v. Pape, 362 U. S. 926, 80 S. Ct. 756	7
Monroe v. Pape, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492	6, 7, 8, 9
Mylius v. McDonald, 61 W. Va. 405, 56 S. E. 602, 10 A. L. R. N. S. 1098, 11 Ann. Cas. 812	10
Pickling v. Pennsylvania R. Co., 151 F. 2d 240	7, 9
Polk Co. v. Glover, 305 U. S. 5, 59 S. Ct. 15	3, 5
Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495	8
Stift v. Lynch, 267 F. 2d 237	6, 7, 8, 9
Tate v. Arnold, 223 F. 2d 782	7
U. S. v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1386	8
Williams v. United States, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774	8

Page

Constitution Cited

Amendment Four, United States Constitution 1
Amendment Thirteen, United States Constitution 11
Amendment Fourteen, United States Constitution 8

Statutes Cited

R. R. S. Neb. 1943, Section 29-102 9
R. R. S. Neb. 1943, Section 29-2001 9
R. R. S. Neb. 1943, Section 29-2201 9
R. R. S. Neb. 1943, Section 29-2301 2
R. R. S. Neb. 1943, Section 29-2303 ..... 2, 3, 4, 6
R. R. S. Neb. 1943, Section 29-2401 ..... 2, 6
R. R. S. Neb. 1943, Section 29-2805 4
R. R. S. Neb. 1943, Section 29-2806 4
R. R. S. Neb. 1943, Section 29-2809 6
R. R. S. Neb. 1943, Section 29-2819 4

IN THE

Supreme Court of the United States

No. 675

October Term, 1962

PAUL E. RHODES,

Petitioner,

vs.

NORVAL HOUSTON, et al.,

Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PAUL E. RHODES, *pro se*,
Howe, Nebraska.

ARGUMENT

Arrest without warrant violates Fourth Amendment of the United States Constitution and the rule of Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081.

It is noted on page 15 in brief of respondents that they rely on criminal procedure in contempt proceedings, Sec-

tion 29-2301, Reissue Revised Statutes of Nebraska 1943 which is a felony criminal procedure statute. If they would have merely looked at succeeding Section 29-2303, Reissue Revised Statutes of Nebraska 1943 quoted in full in petitioner's Petition at page 37 of Appendix they would have noticed and this Court will note that a commitment is not a warrant for the purpose of arrest and is no authority for arrest and that the court must order the convicted person into the custody of sheriff. The complaint alleges (R. 7, R. 8, R. 20):

> "* * * in complete absence of any mittimus or other direction by the District Court issued and 'Order of Commitment' * * *."

Respondents completely ignoring statute 29-2303 supra:

> "* * * it shall be duty of court to order person so convicted into the custody of the sheriff. * * *"

Clearly demonstrating that it is the court, judge, that must order the accused into custody. The said statute 29-2303 Complaint (R. 20) goes on further to clearly demonstrate a commitment is not a warrant by which the sheriff can deprive an accused of his liberty by containing the following language:

> "* * * if a person so convicted shall escape, the jailer or other officer from whose custody the escape was made may return to the clerk of the proper court the writ by virture of which the convict was held in custody, with information of the escape endorsed thereon, whereupon clerk shall issue a warrant stating such conviction, and commanding the sheriff of the county to pursue such person into any county in the state; and the sheriff shall take such person and commit him to the jail of the county. * * *"

Also see 29-2401, R. R. S. Nebr. 1943, p. 38, Appendix of petitioner's Petition.

Thus clearly showing respondents in pages 14 and 15 in their brief are mistaken as to the law when they say no court order or warrant is necessary by Nebraska law to deprive accused of his liberty.

Motion to dismiss admits constitutional violations alleged in complaint and respondents could not defeat the allegations by attaching false affidavits to motion to dismiss and going outside face of complaint.

The dangers of allowing the court and the respondents to go beyond the face of the Complaint in considering the Motion to Dismiss is contrary to this court's ruling in *Polk Co. v. Glover,* 305 U. S. 5, 59 S. Ct. 15 is clearly apparent by respondents' statements on pages 16 and 17 of their brief in case at bar.

The Complaint in the case at bar (R. 9) clearly alleges that the arrest on Jan. 16, 1961 was under color of "order of commitment", of the clerk of the District Court of Morrill County, Nebraska (R. 8). Therefore, when the respondents allege that the arrest of Jan. 16, 1961 was not by virtue of this order of commitment of the clerk of the District Court of Morrill County, Nebraska they are misstating the facts alleged in Complaint (R. 8, R. 9, R. 18) and further ignoring the order granting the writ (R. 9), the particular matters considered by the court were the matters alleged in petition for habeas corpus and respondents confusing the matters considered by the court issuing the writ with the Order of Discharge (R. 10). When the sheriff by his return (R. 40) attached a copy of the Order of Commitment of the clerk of the District Court of Morrill County (R. 8) and the same was determined by the court (R. 10) to be no order of commitment because the court, judge, had made no order pursuant to Section 29-2303, R. R. S. Nebr. 1943, quoted in full on page 37

of petitioner's Petition where the statute makes it the duty of the court and not the clerk thereof to order person so convicted into custody of the sheriff. The statute reads:

> "* * * it shall be duty of court to order person so convicted into the custody of the sheriff. * * *"

For the reason the Morrill County Court had not made such order, the clerk was without authority to issue the Order of Commitment (R. 8). For this reason the District Court of Cheyenne County, Nebraska, entered a second order on Jan. 16, 1961 not being the order of the matters considered in issuing the writ, for the reason the sheriff failed to meet the issues of the writ and the Petition on which it was granted (R. 9) for the reason the arrest was not by virtue of warrant or order of commitment. The commitment attached to the sheriff's return (R. 8) being issued by the clerk of the court without an order of the court (R. 7) was not a valid order of commitment, was a nullity, and stood for nothing so long as the court had not ordered the person convicted into the custody of the sheriff pursuant to Section 29-2303, R. R. S. Nebr. 1943.

Respondents attempt to dispute the record of the habeas corpus proceeding in the case at bar by claiming the sheriff's return is a false return to the writ of habeas corpus, ignoring Sections 29-2805, 29-2806, R. R. S. 1943, and 29-2819, R. R. S. 1943 Reissue, making the return *prima facie* true and therefore binding on the respondents in the case at bar.

To demonstrate the misstatements of the respondents in their brief pp. 16-17 with regard to Commitment (R. 8) of the Complaint a certified copy of the Commitment copy as attached to sheriff's return in Cheyenne County,

Nebraska, habeas corpus proceeding is furnished the Court with this reply brief to clarify the confusion and misstatements which have resulted from the respondents' contentions that said document did not exist, as part of the sheriff's return in the Cheyenne County habeas corpus proceeding as alleged by your petitioner (R. 9).

This demonstrates the dangers that exist and the confusions which result when the court goes beyond the face of the Complaint contrary to this court's ruling in *Polk Co. v. Glover*, supra.

The respondents attempt to and the Honorable Judge Van Pelt defeated the allegations of petitioner's Complaint (R. 13, 23). The petitioner was committed to hard labor (involuntary servitude), contrary to the fourteenth amendment of the United States Constitution by securing false affidavits of John Greenholtz and Maurice Sigler and attaching same to Motion to Dismiss (R. 52-54) which is contrary to leading decision of this court in *Polk Co. v. Glover*, supra, and contrary to rules in all Circuits except the Eighth requiring allegations of Complaint to be taken as true.

None of the acts of respondents in case at bar were done in accordance with court order.

Respondents on page 11 of their brief claim that all of the actions complained of by petitioner were done in accordance to court order fair on its face which is contrary to the allegations of petitioner's Complaint (R. 7 #V and R. 20 #IV, V). Petitioner specifically alleges:

IV

"That the Court, District Court of Morrill County, in Case No. 4819 never did order this plaintiff into the custody of the sheriff of Morrill County, Nebraska

in case No. 4819, after his discharge from custody on August 1, 1960, and subsequent discharges on habeas corpus on September 2, 1960, and January 16, 1961." "That Section 29-2303, R. R. S. Nebr. 1943, specifically provides a commitment is not a warrant with which the sheriff may use to deprive a person of his liberty and arrest without a warrant violates and is a deprivation of rights, guaranteed by Articles I, Sections 3 and 7 of the Nebr. Constitution and the IV and XIV Amendments to the Constitution of the United States of America."

Court's attention is directed to Section 29-2303, R. R. S., 1943 Reissue quoted in full on pages 37-38 of Appendix in petitioner's Petition in case at bar. Therefore the court having entered no order ordering petitioner in custody of sheriff, all actions of respondents in depriving this petitioner of his liberty and twice committing this petitioner to HARD LABOR is in violaton of state law and state Constitution as well as United States Constitution namely Article I, Sections 2 and 3 of Nebr. Constitution and Sections 29-2303, 29-2401, 29-2809, R. R. S. Nebr. 1943, Reissue 1956 and said statutes set forth in full on pp. 37, 38, 39, 40 on Appendix D in petitioner's Petition in case at bar.

The decision of Monroe v. Pape, 365 U. S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 has application to case at bar contrary to contentions of respondents, page 11 of their brief.

It is noted that Honorable Judge Van Pelt in his opinion (R. 72) 202 F. Supp. 634, relies on case of *Stift v. Lynch*, 267 F. 2d 237, and the same line of cases relied on by respondents on pages 10 and 11 of their brief to defeat the decision of *Monroe v. Pape*, supra, 81 S. Ct. 475.

It is clearly noted in case *Stift v. Lynch*, supra, the con-

flict between circuits is clearly pointed out by the following language to-wit:

> "Plaintiffs argue that the Federal Civil Rights Act gives a right of action to every individual whose federal rights have been trespassed upon under color of law, and that the statute makes no exception for judicial officers, quasi-judicial officers and law enforcing officers. Plaintiff points out that #1983 states that 'every person' shall be liable to the party injured. This argument finds support in Pickling v. Pennsylvania Railroad Co., 3 Cir., 151 F. 2d 240, 248, 250. The court there held that certain well-recognized common law immunities have been abrogated by Congress."

> "The views expressed in Pickling represent a minority view. The argument there made has been considered and rejected in the First, Sixth, Seventh and Eighth Circuits. Francis v. Craft, 1 Cir., 203 F. 2d 809; Kenney v. Fox, 6 Cir., 232 F. 2d 288; Cawley v. Warren, 7 Cir., 216 F. 2d 74 and Tate v. Arnold, 8 Cir., 223 F. 2d 782."

Conflict between circuits and the fact that decisions of courts below in case at bar are in conflict with leading decision of *Monroe v. Pape*, supra, by the following words from said opinion:

> "All defendants moved to dismiss, alleging the complaint alleged no cause of action under those acts or under the Federal Constitution. The District Court dismissed the complaint. The Court of Appeals affirmed, 272 F. 2d 365, relying on its earlier decision, Stift v. Lynch, 7 Cir., 267 F 2d 237. The case is here on certiorari *which we granted because of seeming conflict* of THAT RULING with our prior cases. 362 U. S. 926, 80 S. Ct. 756." (Emphasis supplied).

The United States Supreme Court by the majority opinion by Justice Douglas held that Congress had power to

enforce the Fourteenth Amendment and did so by the Civil Rights Act and did so by the following language:

> "There can be no doubt at least since Ex Parte Virginia, 100 U. S. 346-347, 25 L. Ed 676, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it. See Home Tel. Co. v. City of Los Angeles, 227 U. S. 278, 287-296, 33 S. Ct. 312, 314, 318, 57 L. Ed. 510. The question with which we now deal is a narrower one of whether Congress, in enacting #1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official abuse of position. Cf. Williams v. United States, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774; Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495; United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1386. We conclude it did so intend."

Above holding by the Court in *Monroe v. Pape* is complete overruling of the four holdings of court in *Stift v. Lynch*, 267 F. 2d 237 as follows to-wit:

1. "Liability under Federal Civil Rights Act does not apply to 'every person'. 42 U. S. C. A. 1983."
2. "State's attorney and assistant state's attorney were immune to action under Civil Rights Act for their actions in connection with official prosecutions. 42 U. S. C. A. 1981 et seq. 1983, 1985."
3. "Judges of courts of record and of general jurisdiction are immune from civil liability for acts done by them in exercise of their judicial functions. Federal Civil Rights Act."
4. At page 240: "Sheriffs and deputy sheriffs are immune to liability under the Federal Civil Rights Act."

The holdings of courts below in case at bar are in direct conflict with *Monroe v. Pape*, supra, and in accord with *Stift v. Lynch*, supra, which emphasizes conflict betweeen Circuits, *Pickling v. Penn. R. Co.*, 151 F. 2d 240, which is reason Court should grant writ of certiorari to straighten out conflict between circuits and the fact the Eighth Circuit is contrary to rulings of this Court and the fact that the Eighth Circuit needs to be so told is emphasized by *Baird v. Sexton*, 277 F. 2d 418, page 432:

> "At least, we so interpret the statute until Congress broadens them or until the Supreme Court tells us otherwise."

In the case at bar this Court should tell them otherwise.

Trial in absentia results whenever case proceeds to trial on its merits in the absence of the accused.

Respondents on pages 12 and 13 of their brief now try to dispute *trial in absentia* ignoring judgment of trial court (R. 7) to-wit:

> "* * * the defendant was not present and not represented by counsel. * * *"
> "* * * matter came on further to be heard on its merits. * * *"

Respondents on said pages ignore *In re Oliver*, 333 U. S. 257, 275, 68 S. Ct. 499, 507, 508, 509, 510, set out at page 22 of petitioner's Petition. Respondents further concede by quoting Nebraska criminal procedure statutes apply to contempt proceedings in Nebraska. Further ignoring that they violated due process procedural statutes 29-102, 29-2001, 29-2201, R. R. S. Nebr. 1943, Reissue 1956, positively requiring presence of accused at time of trial and sentencing. Said statutes set out in full in Appendix D of petitioner's Petition, p. 37. Therefore all of their actions—*trial in absentia*, arrest without warrant, forced to

serve said sentence at *hard labor twice*—all violates Nebraska statutes and Constitution as well as the United States Constitution.

Respondents' reference to Honorable Judge Van Pelt's opinion on page 12 of their brief that the court had jurisdiction for trial on the merits of contempt procedings *in the absence of the body of the accused* is a finding absolutely contrary to procedural due process guaranteed by the United States Constitution. *Love v. State*, 71 Tex. Crim. 259, 158 S. W. 532:

> "The court had no power or authority to try one accused of a misdemeanor, in his absence, over his attorney's protest and objection for him, if he was sick, and absent on that account, his case should not have been forced to trial. If the court was satisfied that he was feigning illness, or was not in fact sick, so as to prevent his appearance, he should have forfeited his bond, issued another writ for his arrest, and had the accused brought into court, and then proceeded with the trial."

Therefore this court should grant this writ fully explaining to Eighth Circuit Court procedural due process as above set out in *Love v. State*, supra, and clearly explain to said Circuit Court that *in a criminal contempt proceeding the court has no power, authority, jurisdiction in absence of body of accused.* The doctrine is further explained in *Mylius v. McDonald*, 61 W. Va. 405, 56 S. E. 602, 10 A. L. R. N. S. 1098, 11 Ann. Cas. 812:

> 'The record shows no presence of Mylius at the time when the order of arrest and imprisonment was made. Its construction is that he was absent. It must show his presence. As stated above, a proceeding for contempt is a criminal proceeding. Judgment of imprisonment cannot be rendered in the absence of the person. * * * The judgment of imprisonment, having been rendered in the absence of Mylius, is utterly *void*,

because the authorities just cited show that the judgment of imprisonment must be in the presence of the accused. A court may impose a fine in his absence. It may try him after legal notice for a misdemeanor, without his presence; but never can it impose imprisonment without his presence. *It must by proper process, get him before the court in BODY.* That process, in case of contempt, is called an 'attachment,' which is used in chancery language, only as another word for common-law 'capias.'"

CONCLUSION

The analysis of facts made by the District Court and confirmed by the Court of Appeals does not correctly state the facts as the printed Record furnished this court shows and pointed out in petitioner's Petition and Reply Brief. The conclusions of law and said opinions are in conflict with the opinions of this court, contrary to Nebraska statutes, and in conflict with decisions of courts of appeal opinions in third and fifth circuits. Vital constitutional rights are at issue in this case and if Judge Van Pelt's opinion is allowed to stand as the law of the land, vital constitutional rights of everyone are lost, namely right to trial by jury, right to confrontation of witnesses, guarantees against trial in absentia, thirteenth amendment is abolished, citizens may be subjected to involuntary servitude without conviction of a crime, habeas corpus is abolished, the Motion to Dismiss substituted for an Answer resulting in petitioner's Complaint being defeated by affidavits without a trial.

The Court should grant the writ of certiorari to consider these vital constitutional questions in which every citizen of the United States has an interest.

Respectfully submitted,
PAUL E. RHODES, *pro se*,
Howe, Nebraska.